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COMMENT

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Karen L. Wagner*

I. Introduction

> The tangible presence of buildings and sites that speak of other people and other times are a form of history and enable us to chart some of the paths to the present and the future.[1]

The preservation of our historic architectural landscapes is as necessary as the preservation of our natural geographic landscapes.[2] While the natural environment is graced by ma-

* The author dedicates this article to Barbara Shelton Wagner, with gratitude for her insightful commentaries and guidance.

1. N. ROBINSON, REHABILITATING HISTORIC PROPERTIES 79 (1984) [hereinafter HISTORIC PROPERTIES].

2. In the National Historic Preservation Act of 1966, (NHPA), 16 U.S.C. § 470 (1988), Congress recognized that historic architectural landmarks have tremendous value for American citizens. The preamble to section 470 states, in pertinent part:

(b) The Congress finds and declares that-

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

jestic mountains and lakes, the urban environment is equally enhanced by venerable edifices, which contribute "something to the larger idea of the city, to the idea of a public realm that everyone, including those who never had any reason to enter a particular building, could benefit from."[3] Thus, historic preservation is an imperative because once destroyed, unique architectural landscapes are irretrievably ruined.[4]

Although beneficial to the intellectual and cultural life of the public, landmark laws have been unpopular with landowners, who perceive such laws as unjustified restraints on their ability to use their property.[5] This tension has resulted in numerous legal battles over the primacy of public and private

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(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans . . . .

Id.

3. Goldberger, *The City That Was And the City That Is Now*, N.Y. Times, Aug. 18, 1991, at 30, col. 1 [hereinafter *The City That Was*]. The benefit derived from an urban architectural melange is encapsulated by author Penelope Lively in her novel, CITY OF THE MIND. As the omniscent narrator, she describes the protagonist's reaction to the city: "He sees a kaleidoscope of time and mood; buildings that ape Gothic cathedrals, that remember Greek Temples, that parade symbols and images. He sees columns, pediments and porticos. He sees Victorian stucco, twentieth-century concrete, a snatch of Georgian brick." P. LIVELY, CITY OF THE MIND 3 (1991).

4. For example, of the twelve thousand buildings listed in the Historic American Building Survey conducted by the federal government in 1933, more than half have been demolished. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 133, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (Jasen, J., dissenting). Following World War II, historic buildings were replaced by vacant lots and surface parking as the war effort was redirected into construction and urban renewal. ADVISORY COUNCIL ON HISTORIC PRESERVATION, TWENTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 15 (1986) [hereinafter ADVISORY COUNCIL REPORT].

5. C. HAAR & J. KAYDEN, LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA'S COMMUNITIES 13 (1989) [hereinafter LANDMARK JUSTICE]; *see also* Purdum, *Church as Landmark: Battle Rejoined*, N.Y. Times, Apr. 13, 1991, at 27, col. 1 [hereinafter *Battle Rejoined*]; Kennedy, *Landmarking's Double-Edged Sword*, N.Y. Times, Jan. 13, 1991, § 10 (Real Estate), at 1; Crewdson, *Ministry and Mortar: Historic Preservation and the First Amendment After Barwick*, 33 J. URB. & CONTEMP. L. 137 (1988) [hereinafter *Ministry and Mortar*].

rights.[6]

The goals of preservation must vie with the competing interests of property owners. Since landmark litigation began, courts have attempted to balance[7] public and private rights, and the importance of the interests involved:[8]

> Judges must decide whether the government's purpose is legitimate and whether the means chosen to achieve it are reasonable. They must ascertain whether the asserted purpose is the real one or whether it is being used as a mask for illegitimate motivations . . . . They must determine whether government power, exercised to enforce the will of the majority nevertheless must bend to higher principles . . . .[9]

Typically, economics has been the dominant interest asserted by property owners, who want to exploit the economic potential of their land to the fullest extent. Thus, owners claim that by restricting alterations of their property, landmark laws effect a "taking" in violation of the fifth amendment.[10] Yet, that claim is no longer a viable threat to historic preservation.[11]

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6. LANDMARK JUSTICE, *supra* note 5, at 154.

7. "A central theme of balancing may seem meek or contentless to some, particularly to those favoring a single outcome-determinative theory. As a field, however, land use does not lend itself easily to a unified theory." *Id.* at 194.

8. *Id.* at 13.

> Distilled to its essence, a land use case presents a clash between private and public rights. Property owners assert that the government has impermissibly interfered with that bundle of rights called private property. Governments respond that they are properly exercising their authority in order to advance the public welfare.

Id.

9. *Id.*

10. The fifth amendment states, in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

11. The pivotal case on this issue is *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Penn Central Transportation Company was the owner of Grand Central Terminal, a 1913 French Beaux-Arts style masterpiece, which was designated a landmark in 1967. *Id.* The company wanted to construct a fifty-three story building cantilevered above the terminal building, which entailed tearing down a portion of the 42nd Street facade. *Id.* The company's applications for modifications (in the form of a "certificate of no effect" or a "certificate of appropriateness," *see infra* notes 36-51 and accompanying text), were denied by the New York City Landmarks

During the past decade, however, the interest of religious freedom has emerged as the pre-eminent challenge to the goals of preservation. Due to their intense spiritual, historic, and architectural significance, religious buildings are designated as landmarks more frequently than most other structures.[12] Increasingly, urban churches have become dissatisfied with their landmark status. In support of their claims, these churches contend that economic factors, such as dwindling congregations and increasing maintenance costs, make landmark status uniquely burdensome for them as a group. Churches also maintain that they should be allowed to modify their landmarked structures in order to suit new purposes or generate additional income.[13]

Municipal landmark laws are attacked by church owners through diverse strategies. Some have petitioned for exemption from landmark laws.[14] Other owners have openly defied the law by drastically modifying or even demolishing their landmarked structures, without the necessary prior approval of a landmarks commission under the landmark laws.[15] An-

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Preservation Commission. The company argued that the Commission's denial of permission to build the tower effected a "taking" in violation of the fifth amendment. *Penn Central*, 438 U.S. at 108. The Court upheld the constitutional validity of the Landmarks Law, stating that there had been no "taking" without just compensation. *Id.* at 104.

12. In New York City, for example, out of the 600 buildings designated as landmarks, fifteen percent are religious structures. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (1990), *cert. denied*, 111 S. Ct. 1103 (1991). "[C]hurches and synagogues are some of the most significant buildings in any community . . . [and] in New York City the 18th and 19th century churches are among the oldest buildings that remain." New York Institute on Architecture, 45 Occulus on current new york architecture 3 (1983) [hereinafter Occulus].

13. *See, e.g.*, Society of Jesus v. Boston Landmark Comm'n, 409 Mass. 38, 564 N.E.2d 571 (1990). The burden on church property owners is described as follows: "Generally, landmark restrictions require churches to spend funds on the maintenance and repair of their historic properties. Additionally, the church incurs costs resulting from the requirement to negotiate successfully the time-consuming Commission procedures . . . . More importantly, the statutory requirement that churches spend donation money on architectural preservation, could potentially discourage new members from joining historic churches." Crewdson, *Ministry and Mortar*, *supra* note 5 at 158-59.

14. *See* Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986).

15. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 3, §§ 25-309 to -321 (1986); SEAT-

other tactic used by church owners has been to engage in litigation against the municipalities, alleging that the landmark laws violate the right to free exercise of religion under the first amendment of the Constitution.[16]

Recently, three cases were brought by religious property owners challenging the constitutionality of municipal landmark laws. The decisions reveal a potential conflict between the state and federal courts, and consequently, a threat to preservation. In *First Covenant Church v. City of Seattle*[17] and *Society of Jesus v. Boston Landmarks Comm'n*,[18] the highest Washington and Massachusetts state courts held that the municipal landmark laws violated the right of free exercise under the federal and state constitutions, respectively. By contrast, the Second Circuit held, in *St. Bartholomew's Church v. City of New York*,[19] that New York City's landmark law did not violate the right of free exercise under the federal Constitution. The three 1990 cases encompass subsidiary issues, such as: What test should courts apply to determine whether the right of free exercise was violated? Should the courts devise a special test for religious, as opposed to commercial institutions? Should all municipal landmark laws be held invalid as applied to religious properties?

The focus of this comment is upon these emerging controversial issues in landmark preservation. Part II describes the purpose and regulatory operation of municipal landmark laws. Part III discusses the factual and legal aspects of the state court decisions in *First Covenant* and *Society of Jesus*. Part IV discusses the facts surrounding *St. Bartholomew's Church*, as well as the approach utilized by both the district court and the Second Circuit. Part V compares the outcome of

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TLE, WASH., MUN. CODE ch. 25.12, §§ 25.12.010 to .910 (1977); 1975 Mass. Acts 772.

16. The first amendment states, in pertinent part: "Congress shall make no law respecting an establishment of religion or the free exercise thereof . . . ." U.S. CONST. amend. I.

17. 114 Wash. 2d 392, 787 P.2d 1352 (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

18. 409 Mass. 38, 564 N.E.2d 571 (1990).

19. 728 F. Supp. 958 (1989), *aff'd*, 914 F.2d 348 (1990), *cert. denied*, 111 S. Ct. 1103 (1991).

the three cases and evaluates the implications of each court's holding. Finally, Part VI analyzes the future of this conflict between landmark preservation and religious freedom.

II. Statutory Background: Municipal Landmark Laws

A. *Urban Imperatives*

> The moral imperatives to them were not stylistic but urbanistic. Both [architects] McKim and White loved the city they were making, and believed deeply . . . that buildings were in the city and of the city, . . . uplift[ing] the public realm through an elegant facade, handsome detailing and a respect for the street.[20]

Local governments have been at the forefront of the preservation movement since its inception in the United States.[21] While a national preservation act was not passed until 1966,[22] cities like Charleston and New Orleans enacted preservation ordinances and constitutional amendments establishing historic districts as early as 1931 and 1936.[23] Effective preservation laws are an imperative in urban areas "where the forces

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20. *The City That Was*, *supra* note 3, at col. 2.

Author Penelope Lively describes the value of architecture to a city, "The resonances of the place are universal. If the city were to recount its experience, the ensuing babble would be the talk of everytime and everywhere, of persecution and disaster, of success and misfortune. The whole place is a chronicle, in brick and stone, in silent eloquence, for those who have eyes and ears." P. LIVELY, CITY OF THE MIND 3-4 (1991).

21. ADVISORY COUNCIL REPORT, *supra* note 4, at 15. Municipalities are empowered to enact landmark laws pursuant to state enabling legislation. *See, e.g.*, N.Y. GEN. MUN. LAW § 96-a (McKinney 1977 & Supp. 1989).

22. *See supra* note 2.

23. ADVISORY COUNCIL REPORT, *supra* note 4, at 27. Landmark laws must be properly constructed in order to effectuate their purposes. For example, in 1925, a French Quarter preservation group in New Orleans created the Vieux Carre District Commission, "to protect the old colonial city from 'the encroachment of modern business.' " HISTORIC PROPERTIES, *supra* note 1 at 14. This enactment represented the first municipal ordinance adopted in the United States for the protection of an historic area. Ultimately the Commission was ineffective, because it could only " 'study' and 'make recommendations' and lacked the power to prevent the demolition of architecturally significant buildings." *Id.* (quoting BAUMBACH, JR., & BORAH, THE SECOND BATTLE OF NEW ORLEANS (1981)).

that produce physical change are most dynamic . . . . As urban concentration increases, the demands for additional [ ] commercial space become all the more incessant . . . ."[24]

Municipal landmark laws have in common a shared dismay at the rampant destruction of historic buildings in their cities. This destruction,[25] has resulted in a diminished urban presence historically, aesthetically, and economically.[26] Economic factors play a pivotal role in the enactment of landmark laws, since cities are cognizant that their appeal to tourists could not "be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets."[27] Other economic benefits of preservation include increased

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24. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 134, 316 N.E.2d 305, 313, 359 N.Y.S.2d 7, 18 (1974) (Jasen, J., dissenting). A Massachusetts court commented on similar urban pressures in Boston "[t]he [Back Bay] area's rich background and character have led to its designation as a municipal historic district . . . . Now, like most areas of Boston proper, the Back Bay is undergoing a wave of renovation and new construction, including considerable commercial development." Conservation Law Found. of New England v. Division of Water Pollution Control, 27 Mass. App. Ct. 544, 545, 495 N.E.2d 848, 849 (1986).

25. *See supra* note 4. For example, Pennsylvania Station in New York City, designed by the famous Gilded Age architectural firm, McKim, Mead and White, represented an ingenious engineering solution to the problem of an urban railroad station. *The City That Was*, *supra* note 3, at col. 3. When the station was demolished on October 30, 1963, one reporter captured the horror of many as he wrote, "Until the first blow fell, . . . no one was convinced that Penn Station really would be demolished or that New York would permit this monumental act of vandalism . . . ." N. SILVER, LOST NEW YORK 37 (1967).

Thus, in 1965, especially aware of the vulnerability of historic structures following the destruction of Pennsylvania Station, New York City wanted to prevent another "monumental act of vandalism" and enacted its landmark law that year. Before that time, there was no formal process to assess the alternatives to saving a building. The New York Chapter of the American Institute of Architects, Occulus, *supra* note 12 at 5.

26. New York City found that many buildings "have been uprooted . . . without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values [therein] represented . . . ."
NEW YORK, N.Y., ADMIN. CODE ch.3, § 25-301(a) (1986).

27. *Id.* § 25-301(a). For example, municipalities such as Williamsburg and San Francisco find that their historic sites, Colonial Williamsburg and Ghiaradelli Square, are a principal part of their attraction to tourists. HISTORIC PROPERTIES, *supra* note 1, at 14.

property values due to the prestige of landmark status.[28] The tax benefits of preservation are also substantial. In many situations historic properties receive tax deductions or exemptions. Moreover, municipalities receive additional tax revenues, since the uniqueness of the historic area draws new merchants and business.[29]

Another reason for the preservation of historic buildings was to bolster morale by "foster[ing] civic pride in the beauty and noble accomplishments of the past . . . ."[30] The desire to preserve buildings that embody segments of history has always provided a common foundation for preservation legislation.[31] Yet, only recently have purely aesthetic concerns become a legitimate basis for preservation.[32] Because they have a common impetus for their enactment, municipal landmark laws express a similar purpose. For example, Boston's landmark law states that its purposes include:

> (a) to protect the beauty of the city of Boston and improve the quality of its environment through identification, recognition, conservation, maintenance and enhancement of areas, sites, structures and fixtures which constitute or reflect distinctive features of the political, economic, social, cultural or architectural history of the city;
> (b) to foster appropriate use and wider public knowledge and appreciation of such features, areas, sites, structures and fixtures;
> (c) to resist and restrain environmental influences adverse to such purposes; and

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28. HISTORIC PROPERTIES, *supra* note 1, at 80.

29. *Id.* at 80-81.

30. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-301(d) (1986).

31. *See, e.g.*, Gray, *A Window to the Past in the Present*, N.Y. Times, Aug. 11, 1991, at 6.

32. Not surprisingly, New York City enacted its landmark law under the auspices of its police powers. When the law was enacted in 1965, purely aesthetic concerns alone were not considered a valid basis for legislation. Presently, aesthetics are considered a valid base for land use regulation, and legislation need not "mask aesthetic concerns as public health, safety or welfare, in order to articulate a valid basis for regulation." *See* Riesel, *Aesthetics as a Basis for Regulation*, 1 PACE L. REV. 629 (1983).

> (d) to encourage private efforts in support of such purposes; and
> (e) by furthering such purposes, to promote the public welfare, to strengthen the cultural and educational life of the city and the commonwealth and to make the city a more attractive and desirable place in which to live and work.[33]

Similarly, in 1965, the City of New York enacted its landmark law in order to protect, enhance, and perpetuate those buildings or areas in the city which "reflect elements of the city's cultural, social, economic, political and architectural history . . . ."[34] Increasingly, cities became aware that "landmark buildings and historic districts needed heightened legal protection against real estate market pressures [and] . . . enacted, strengthened or applied with renewed vigor their landmark preservation laws."[35]

B. *The Operation of Landmark Laws*

Landmark laws work differently than the power of eminent domain, where an entire parcel of private property is taken.[36] A landmark law's "primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land use decisions affecting these properties and providing services, standards, controls and incentives that will encourage preservation by private owners and users."[37]

Municipal landmark laws follow a common statutory scheme. The power to identify and designate buildings as landmarks is generally vested in a commission.[38] A commission can be comprised of about nine to eleven members.[39]

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33. 1975 Mass. Acts 772, § 1.

34. NEW YORK, N.Y. ADMIN. CODE ch. 3, § 25-301(b) (1986).

35. LANDMARK JUSTICE, *supra* note 5, at 154.

36. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see supra* note 11.

37. *Penn Central Transp. Co.*, 438 U.S. 104, 109-10.

38. *See, e.g.*, 1975 Mass. Acts 772, § 3.

39. *See, e.g.*, NEW YORK, N.Y., CITY CHARTER ch. 74, § 3020(1) (1990).

These commissions are highly diversified and expertised bodies, whose members include: architects, historians, city planners, landscape architects, realtors, and local residents.[40]

The designation of a landmark by the commission involves a carefully-crafted procedure, designed to afford maximum due process to property owners. First, the commission makes a preliminary designation of a building as a potential landmark.[41] This nomination can be made at the commission's own initiative or at the request of others, but it must be based upon whether the building conforms to the law's definition of a "landmark." Typically, a "landmark" is defined as a building which is over twenty-five to thirty years old, and possesses unique historic or aesthetic values.[42]

Second, the commission serves notice upon the landowner and then holds a notice and comment period. This is followed by a third step, a public hearing, where witnesses testify and evidence is presented. The hearing provides a forum for all interested parties to present their views on the designation.[43] Finally, the commission's determination on whether the building will be designated a landmark is synthesized into a written report.[44] The commission's determination is typically subject to approval of one or more governmental bodies before final designation. Both reports are subject to approval by the city council, which then holds another public hearing.[45]

The regulatory process continues after a building is officially designated a landmark. The owner is required to maintain the structure "in 'good repair' to assure that the law's objectives not be defeated by the landmark's falling into ir-

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40. Members are typically appointed by the mayor and serve without compensation. *See id.* § 3020(2)(a).

41. Boston's landmark law provides that a preliminary designation shall require "an investigation and report on the historical and architectural significance of the structure, sites or objects to be designated," including an assessment of the property's economic condition. 1975 Mass. Acts 772, § 4.

42. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-302(n) (1986). *See also*, SEATTLE, WASH., MUN. CODE ch. 25.12, §§ 25.12.160, 25.12.350 (1977); *but see*, 1975 Mass. Acts 772, § 2 (no specific age requirement as a prerequisite for a landmark).

43. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-303 (1986).

44. *See, e.g.*, SEATTLE, WASH., MUN. CODE ch. 25.12, § 25.12.430 (1977).

45. *See, e.g.*, NEW YORK, N.Y., CITY CHARTER ch. 74, § 3020(8)(a)(b) (1990).

remedial disrepair."[46] Also, the owner cannot lawfully alter the landmark in any way, even for repairs, without first securing approval of the commission in the form of a certificate. When a certificate is granted, the determination signifies that the proposed modifications are in harmony with the landmark's qualities. The commission's approval of modifications usually is in the form of a "certificate of no effect," or a "certificate of appropriateness" under New York's landmark law.[47] In Boston, such written approval is known as either a "certificate of exemption" or a "certificate of design approval," and in Seattle, a "certificate of approval."[48]

The certificate procedure is designed to ensure "that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in the use of the property."[49] To that end, denial of a certificate by a commission is subject to judicial review, and the owner is permitted to submit an unlimited number of modification proposals to the commission. In addition, the owner can work closely or consult with commission members to ensure the resulting proposal will be approved.

The landmark laws specify those factors which the commission must consider in deciding whether to grant a certificate. These factors typically include: 1) whether any exterior architectural feature would be changed or destroyed; 2)

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46. *Penn Central*, 438 U.S. at 111-12; *see supra* note 11.

47. Under New York's law, an owner applies for a "certificate of no effect" when the proposed alterations will not have an impact on the landmarked aspects of the structure. A "certificate of appropriateness" or "approval," on the other hand, is sought when the owner knows that the proposed alterations will significantly impact the landmark. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-305(a)(1) (1986).

The statute states,

> [i]t shall be unlawful for any person in charge of a landmark site . . . to alter, reconstruct or demolish . . . a part of such site . . . unless the commission has previously issued a certificate of no effect on protected architectural features [or] a certificate of appropriateness or a notice to proceed authorizing such work . . . .

Id.

48. 1975 Mass. Acts 772, § 5; SEATTLE, WASH., MUN. CODE ch. 25.12, § 25.12.670 (1977).

49. *Penn Central*, 438 U.S. at 112.

whether any new construction would affect or not be in harmony with the external appearance of the site; 3) the relationship between such exterior architectural features of the proposed new structure and the exterior architectural features of the landmark; and 4) "the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."[50]

III. State Caselaw: *Society of Jesus* and *First Covenant*

During 1990, state courts demonstrated a tendency to give religious property owners considerably more constitutional protection under the free exercise clause than the federal courts. This trend is exemplified by *Society of Jesus v. Boston Landmarks Commission*,[51] and *First Covenant Church v. City of Seattle*.[52]

A. *Society of Jesus*

1. *The Designation*

The Society of Jesus (the Jesuits), owned The Church of the Immaculate Conception in Boston, whose exterior is described as "an outstanding example of mid-nineteenth century renaissance revival architecture."[53] The interior is cited as one of the best examples of ecclesiastical architecture in the country. Another exceptional feature of the church was a rare 1863 E. & G.G. Hook organ.[54] According to the Jesuits' perception, however, the structure was "an aging, oversized building," and they felt the configuration of the interior no longer suited their current uses, due to "sparse attendance" at services.[55]

In 1986, without first obtaining a building permit, the Jesuits decided to convert the church's interior from a house

50. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-307 (1986).

51. 409 Mass. 38, 564 N.E.2d 571 (1990).

52. 114 Wash. 2d 392, 787 P.2d 1352 (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

53. *Society of Jesus*, 409 Mass. at 40, 564 N.E.2d 571, 572.

54. NATIONAL TRUST FOR HISTORIC PRESERVATION, 8 PRESERVATION L. RPTR. 3,007 (1989).

55. *Id.*

of worship into: office space, living quarters, and counseling facilities.[56] The reconfiguration of the Immaculate Conception Church interior entailed the removal of the existing main altar, tabernacles, and altar tables.[57] To that end, the church's own officials began furtively destroying the interior of the church in order to avoid landmark designation.[58]

The destruction of the church's interior provided the impetus for preservation groups to petition the Boston Landmarks Commission (the Commission), to give temporary landmark status to the church in 1987. In 1989, the Commission permanently designated part of the interior as a landmark, under section 5 of the landmark law.[59]

2. *The Litigation*

The Jesuits appealed the Commission's designation of the Immaculate Conception Church on constitutional grounds, and the complaint challenged the facial validity of the landmark law, claiming that "the mere designation of the church as a landmark had violated their constitutional guarantee of the free exercise of religion" under federal and state constitutions.[60] Specifically, the Jesuits challenged the authority of the Commission to designate the interior of a church as a landmark, under the first amendment free exercise clause of the federal Constitution and the Massachusetts State Constitution.[61]

The trial court held that the designation, apart from any

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56. *Id.* The Jesuits also wanted to construct condominium units on adjacent property. *Id.*

57. *Society of Jesus*, 409 Mass. at 40-41, 564 N.E.2d at 572.

58. NATIONAL TRUST FOR HISTORIC PRESERVATION, 8 PRESERVATION L. RPTR. 3007; *see also, Ministry and Mortar*, *supra* note 5, at 158 n.153 (citing *Angels with Dirty Faces*, Preservation News (1986)).

59. *See* 1975 Mass. Acts 772, §§ 5(a), 6, 7. Specifically, the portions that were designated were the "nave, chancel, vestibule and organ loft on the main floor- the volume, window glazing, architectural detail, finishes, painting, the organ and organ case." *Society of Jesus*, 409 Mass. at 40, 564 N.E.2d at 572.

60. NATIONAL TRUST FOR HISTORIC PRESERVATION, *supra* note 53, at 3,008.

61. *Id.* at 3,009. While the appeal from the trial court was pending, the Jesuits submitted another renovation plan which was approved by the Commission, and the approved changes were made. *Id.*

further regulation such as a "certificate of approval," violated the free exercise clause of the first amendment. In its analysis, the court decided that "the mere fact that the Jesuits honestly perceived a restriction on this liturgically significant interior structure tends to show the impact of the Landmark Statute on their religious practices."[62]

On appeal, the highest Massachusetts court affirmed the trial court's holding, but only on state constitutional grounds.[63] In weighing the competing interests, the court acknowledged that under the strict scrutiny test, employed in the analysis of constitutional issues, the practice of religion may be regulated in the face of a "compelling" state interest. The strict scrutiny analysis is triggered when a plaintiff shows that a fundamental right, such as free exercise of religion, was infringed upon by government action.[64] As a result of such showing, the court must demand that the government entity show that either "the State does not deny the free exercise of religious belief by its requirement, or that there is a [compelling] state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[65]

The court found that the state's interest in historic preservation did not rise to the level of a "compelling" interest, because only grave abuses warrant impingement on the right of free exercise. Citing to court decisions on religious freedom from 1779, 1817, and 1913,[66] the court asserted the primacy of religious freedom in the founding of its state and in the nation

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62. *Id.* at 3,010.

63. *Society of Jesus*, 409 Mass. at 43, 44, 564 N.E.2d at 571, 574. The relevant state constitutional provision Article II, states, in pertinent part:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

MASS. CONST. part 1, art. II.

64. First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)).

65. *Id.* at 403, 787 P.2d at 1358 (quoting Wisconsin v. Yoder, 406 U.S. 205 (1972)).

66. Adams v. Howe, 14 Mass. 340, 346 (1817), Opinion of the Justices, 214 Mass. 599, 601, 102 N.E. 4464 (1913).

as a whole:

> The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance. In short, under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.[67]

According to the court, it was significant that the Commission designated the interior, because "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship. The government intrusion here is substantially more invasive, reaching into the church's actual worship space . . . ."[68]

Another fact significant to the court's holding was that their state constitution guaranteed religious freedom, and this guarantee was limited only by the government's ability to regulate religious practices for behavior that was disturbing either the public peace or the religious worship of others.[69] Since the Jesuits' proposed renovations would not warrant application of either limitation, the landmark regulations were therefore impermissible government restraints on religious worship.

B. *First Covenant*

1. *The Designation*

In October 1980, First Covenant Church (the Church) was nominated for landmark status under the recently adopted Seattle Landmarks Preservation Ordinance.[70] The

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67. *Society of Jesus*, 409 Mass at 43, 564 N.E.2d at 571, 574.

68. *Id.* at 42, 564 N.E.2d at 573.

69. *See supra* note 63 and accompanying text.

70. SEATTLE, WASH., MUN. CODE ch. 25.12, §§ 25.12.010 to .910 (1977); *First Covenant*, 114 Wash. 2d 392, 787 P.2d 1353 (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

Seattle Landmarks Preservation Board (the Board) voted to designate the church as a landmark. At a public hearing in January 1981, the church objected to the designation. In April, the Board recommended the adoption of controls to preserve First Covenant's exterior, to which the church also objected.[71] To resolve these differences, the city arranged for a hearing with a hearing examiner under the procedures outlined in the landmarks law.[72] After an additional public hearing, the examiner concurred with the board and recommended adoption of the controls. These controls remained in effect until 1985, when First Covenant was officially designated a landmark.

2. *The Litigation*

In 1986, the Church challenged the City of Seattle, claiming that the designation of churches as landmarks was unconstitutional.[73] The trial court granted summary judgment to the city, finding that the claim was not ripe, since the Church had not submitted a proposal for alteration to the Board. The Supreme Court of Washington, however, found a justiciable controversy existed.[74]

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71. Among these controls was a requirement that the church must obtain a certificate of approval prior to altering the landmark for structural changes necessitating a building permit. *First Covenant*, 114 Wash. 2d at 406, 787 P.2d at 1360.

72. SEATTLE, WASH., MUN. CODE § 25.12.560 (1977).

73. *First Covenant*, 114 Wash. 2d at 395, 787 P.2d at 1353.

74. Under the Washington State Uniform Judgments Act, four elements must be present in a case in order for it to satisfy the ripeness doctrine. *Id.* These elements are: 1) an actual dispute between parties of genuinely opposing interests which are concrete and substantial; and 2) a judicial determination of the matter will prove conclusive. The church satisfied these prerequisites by enumerating the manner in which the landmark designation itself already interfered with their religious freedom, even if they never applied for alterations. These limitations included:

(1)interfering with the church's freedom to alter the exterior of the church structure

(2)necessary secular approval of any proposed alteration of the facade

(3)a limitation on the church's ability to sell its property

(4)uncertainty of the discretionary approval confronting the church, and

(5)depreciation in value of property from $70,000 to $40,000 as a result of being landmarked.

Id. at 398, 787 P.2d at 1355.

The issue was framed as "whether the law should prefer religious freedom or an exercise of the police power to maintain the architectural and cultural interests associated with landmark preservation."[75] Conceding that religious freedom was not completely immune from legitimate regulations in the face of compelling governmental interests, the court nevertheless concluded that freedom of religion is in a "preferred position."[76] The test employed to analyze issue was the strict scrutiny analysis.

The court held that the Seattle Landmarks Ordinance violated the right of free exercise under both the federal and state constitutions.[77] Ultimately, the *First Covenant* court, citing the dissent in the *Barwick* case in New York,[78] concluded:

> [B]alancing the right of free exercise with the aesthetic and community values associated with landmark preservation, we find that the latter is clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community.[79]

The court found that the operation of the landmark law on First Covenant Church placed the Church in a position where matters potentially affecting their practice of religion necessitated secular approval. The court was unimpressed with a "liturgy exception" in the designating ordinance, whereby certain alterations did not require the commission's approval. Under the "liturgy exception," "nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy . . . ."[80]

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75. *Id.* at 400, 787 P.2d at 1356.

76. *Id.* (quoting Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

77. *Id.* at 395, 787 P.2d at 1353-54.

78. Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986).

79. *First Covenant*, 114 Wash. 2d at 409, 787 P.2d at 1361.

80. *Id.* at 406, 787 P.2d at 1360 (emphasis omitted).

The court found the "liturgy exception" to be "a vague standard which does not withstand close scrutiny."[81] Because the liturgy describes the portion of religion transpiring inside the church, with no applicability to the exterior, the infringement on the church's free exercise rights was not lessened.[82] The court also found unconstitutional a proviso to the liturgy exception which required that when the church applies for an architectural change necessitated by changes in the liturgy, the Board must issue the certificate of approval. Before the Board issues the certificate, however, the "Board and owner shall jointly explore . . . possible alternative design solutions . . . ."[83] The court concluded that requiring a church to negotiate with a secular body, "creates unjustified governmental interference in religious matters . . . ."[84]

Under the *First Covenant* court's analysis, the City of Seattle did not prevail because it failed to meet its burden of proof under the strict scrutiny test. The court held "that the preservation of historical landmarks is not a compelling state interest," because the health or safety of citizens was not involved, but rather a matter of urban aesthetics."[85] The court based its evaluation of the worthiness of the state's interest on its reading of the *Penn Central* case.[86] According to the Washington court, the Court in *Penn Central*, had applied a minimum scrutiny test to the New York City Landmark Law. This test merely required the governmental entity to show a "substantial relation" between the government interest and the means chosen to achieve that interest.[87] The minimum scrutiny test was sufficient in *Penn Central* because, the Washington court decided, there was no allegation that a fundamental right had been violated. The *First Covenant* court decided that, had it applied a strict scrutiny test, the Supreme

81. *Id.* at 407, 787 P.2d at 1360.

82. *Id.*

83. *Id* (emphasis omitted).

84. *Id.* at 408, 787 P.2d at 1360.

85. *Id.* at 409, 787 P.2d at 1361.

86. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see supra* note 11.

87. *First Covenant*, 114 Wash. 2d at 408, 787 P.2d at 1361.

Court would have held the New York City Landmark Law unconstitutional.

IV. Federal Caselaw: *St. Bartholomew's Church*

A. *The Designation*

Located on Park Avenue at the corner of 49th and 50th streets in Manhattan, St. Bartholomew's Church property consists of the 1919 church building and the 1928 community house, which are situated on a corner lot with a surrounding garden area.[88] In 1967, the church building and the community house were individually designated as landmarks under section 25-303 of the Landmark Law of New York, following a year of public hearings.[89]

St. Bartholomew's Church and community house are outstanding modern versions of Romanesque and Byzantine architecture in the United States.[90] As part of the designation process, the New York City Landmark Commission issued a report which explains why St. Bartholomew's embodies a "special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City."[91] The designation report states that the church features:

> [A] frieze of low relief sculpture, . . . [and] bronze doors, whose panels depict Old and New Testament themes, . . . considered by many critics to be the finest of their kind in the City. The clerestory walls of the nave rise high . . .

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88. The New York City Landmarks Preservation Commission, *Designation Report: St. Bartholomew's Church and Community House*, Number 1, LP-0275, March 16, 1967 [hereinafter *Designation Report*].

89. *Id.* The Commission held numerous public hearings on the designation of the church from May 1966 through January 1967. Significantly, "There were no speakers in opposition to the designation at any hearing." *Id. See also* NEW YORK, N.Y., ADMIN CODE ch. 3, § 25-303 (1986), which states, in pertinent part: "[T]he commission shall have the power, after a public hearing: (1) To designate . . . a list of landmarks which are identified by a description setting forth the general characteristics and location thereof . . . ." *Id.*

90. *Designation Report, supra* note 88.

91. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-302(n) (the definition of "landmark").

> and are pierced for almost their entire length by large, round-arched windows. A beautiful rose window, with intricate tracery, lights the south wall of the shallow transept . . . . [A]top a high drum, sits the octagonal dome sheathed with tiles and marbles in highly colored and intricate designs . . . . When this handsome dome glitters in the sun, its brilliance offers a glowing contrast to its surroundings.[92]

Architect Bertram Goodhue designed the church building in 1917, skillfully incorporating a triple-porticoed porch from the church's previous location, which was designed by McKim, Mead and White in 1902.[93]

In 1926, Goodhue's associates created the plans for an adjoining, seven-story, terraced community house. Like the church building, the community house is distinguished by an unusual polychromatic appearance, achieved through the combination of salmon-colored brick, grey Cippolino marble, limestone, and tiles of varying hues.[94] The Commission recognized the importance of the community house to the landmark site and noted:

> [T]he style of this building is well suited to its functional requirements, it harmonizes with the Church through the use of the same warm-colored building materials, the continuation of the limestone band courses from the Church and chapel, and the interspersing of decorative details similar in character and scale to those used in the construction of the main house of worship.[95]

This relationship of the church and community house illustrates landmarks which are integral to each other, since the two buildings act as complimentary foils.[96]

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92. *Designation Report*, *supra* note 88.

93. *See supra* note 3. The porch was built in honor of the railroad tycoon Cornelius Vanderbilt. J. TAURANAC, ELEGANT NEW YORK, THE BUILDERS AND THE BUILDINGS 1885-1915, at 82-83 (1985).

94. *Id.*

95. *Designation Report*, *supra* note 88.

96. Boston's landmarks law aptly describes the complimentary effect of architec-

B. *The Application for a Certificate of Appropriateness*

> "[P]articularly when the setting is a dramatic and integral part of the original concept . . . . [W]e must preserve them in a meaningful way — with alterations . . . [that] enhance and perpetuate the original design rather than overwhelm it."[97]

As with many landmarks, St. Bartholomew's was devoted to one use for over seventy years. In 1983, however, the Rectors and Vestry of St. Bartholomew's Church (the Church), were offered 551 million dollars by a British developer to demolish the community house and replace it with a fifty-nine story office tower. The Church claimed that the community house, in its present condition, was inadequate for the Church's needs, and that a new building was necessary. In addition, the Church wanted to use the rental income from the tower to provide financing for Church activities and charities.[98]

Given the landmark designation, the Church was required to secure the approval of the Commission prior to altering the site.[99] From 1984 to 1986, the Commission held public hearings and conducted site visits to determine whether to grant the Church's three separate applications for a "certificate of appropriateness."[100] Ultimately, the Commission denied all

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turally harmonious buildings:

> The commission may designate any area in the city as a protection area as herein provided upon a finding by the commission that the area to be designated is visually related to the landmark . . . . In determining the boundaries of a protection area, the commission shall consider the following elements: (a) major views and vistas of and from the landmark . . . .

1975 Mass. Acts 772, § 2.

97. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 118 (1978) (quoting the Landmarks Commission's designation report for Grand Central Station).

98. St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

99. *See supra* note 46 and accompanying text.

100. St. Bartholomew's Church, Community House, Gardens & Terraces, LPC 86-0345, (New York City Landmarks Preservation Comm'n 1986)(determination). At these hearings, expert witnesses testified and written reports were submitted, all of which went to form the administrative record used by the district court. *See infra*

three applications.[101]

The Church's second application differed from the first in that the Church proposed an office tower with forty-nine stories instead of fifty-nine.[102] The third application differed from the first two in that the Church claimed an exemption from the requirement of securing a "certificate of appropriateness" on the grounds of the "hardship exemption"[103] to the landmark law.[104] Essentially, the "hardship exemption" requires proof by the owner that the property, in its landmarked state, cannot earn a "reasonable return."[105] Specifically, the Church had to prove that it met four elements outlined in section 25-309,[106] showing that it should be exempted because: 1) the owner had entered into a bona fide agreement to sell the property; 2) the existing community house would not be capable (if it were not already tax-exempt) from earning a reasonable return; 3) the community house was inadequate for the Church's purposes; and 4) the buyer intended to demolish the building.[107] The Commission denied the third application because the evidence presented did not support the elements required for a hardship claim.[108]

C. *The Litigation*

1. *The District Court's Decision*

After the third application for a "certificate of appropriateness" was denied, the Church filed suit for declaratory and injunctive relief against the City of New York and the

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notes 110-137 and accompanying text.

101. *St. Bartholomew's Church*, 728 F. Supp. at 961-62.

102. *Id.* at 961.

103. NEW YORK, N.Y., ADMIN. CODE CH. 3, § 25-309 (1986). The determination of whether to grant the third application necessitated five Executive Sessions of the Commission, which were also open to the public.

104. *St. Bartholomew's Church*, 728 F. Supp. at 961.

105. A "reasonable return" is defined as "a net annual return of six per centum of the valuation [of the property]." NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-302(v) (1986).

106. *Id.* § 25-309.

107. *Id.* § 25-309(a)(2)(a-d).

108. *St. Bartholomew's Church*, 728 F. Supp. at 962.

Landmark Preservation Commission of the City of New York under 42 U.S.C. § 1983,[109] alleging deprivation of its rights under the first, fifth, and fourteenth amendments.[110] The Church challenged the landmark law both on its face and as applied. The district court granted summary judgment to the defendants on the issues of the facial validity of the landmark law, and held that the law was not unconstitutional on its face as applied to all churches.[111] A bench trial was held on the issues concerning the unconstitutionality of the landmark law as applied to St. Bartholomew's by conducting a *de novo* review of the evidence before the Commission.[112]

a. *The First Amendment 'Free Exercise' Issue*

The free exercise clause of the first amendment states, in pertinent part: "Congress shall make no law respecting an establishment of religion or the free exercise thereof . . . ."[113] As a religious institution, the Church claimed that the landmark law violated its right of free exercise because the denial of the "certificate of appropriateness" restricted its freedom to use its property as the Church saw fit. The law hindered the furtherance of the Church's religious mission by preventing the demolition the community house.[114]

The community house serves a variety of functions, including athletic facilities, such as a pool and a basketball court, a theater, a pre-school, meeting rooms, kitchen and dining facilities, and office space. In conjunction with the church building, the community house also provides sleeping quarters

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109. 42 U.S.C. § 1983 (1982). This federal statute creates an action for a person who has suffered a constitutional violation at the hands of the state or one of its agencies, such as a municipality. Section 1983 states, "Every person who, under color of any state statute, ordinance [or] regulation . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured in an action at law." *Id.*

110. *St. Bartholomew's Church*, 728 F. Supp. at 960.

111. *Id.* at 963-65.

112. *Id.* at 965. To illustrate the extent of the commission's investigation of this matter, the court notes that the evidence comprising the administrative record was twenty-three volumes in length. *Id.*

113. U.S. CONST. amend. I.

114. *St. Bartholomew's Church*, 728 F. Supp. at 963.

for the homeless.[115]

Relying upon the Supreme Court's free exercise standard set forth in *Lyng v. Northwest Indian Cemetery Protective Assn.*,[116] the district court held that the landmark designation did not violate the Church's free exercise right.[117] In *Lyng*, the Court enunciated a two-pronged test for determining whether there had been a violation of the free exercise clause: 1) whether the governmental action has coerced individuals into violating their religious beliefs; or 2) whether the governmental action serves to penalize in such a way as to deny the plaintiffs an equal share of the rights, benefits and privileges enjoyed by other citizens.[118]

In formulating the test, the Court found "prohibit" to be the operative word in the free exercise clause. Thus, when government action only incidentally burdens, and does not prohibit, the practice of religion, it does not rise to a level of constitutional significance. The governmental entity in such a case is not required to justify its action by showing a compelling interest.[119] To prevail under either prong of the *Lyng* test, the plaintiff must show that the government action imposes an impermissible burden upon religion. Only then will the

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115. *Id.* at 961.

116. 485 U.S. 439 (1988). A federally-funded road project was planned for a segment in the National Forest. A government study found that the land was sacred Indian tribal ground, used for religious purposes. The Court held that the free exercise clause was not violated because the road project would not coerce the Indians into repudiating their beliefs, nor would it penalize their religion in a unique way. *Id.*

117. *St. Bartholomew's Church*, 728 F. Supp. at 963.

118. *Lyng*, 485 U.S. at 446. For an illustration of a violation of the *Lyng* test, the Court cited *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, unemployment benefits were denied an applicant who refused to accept work requiring her to work on Saturdays because it was a holy day in her religion. The Court found the denial contravened the Constitution because it imposed a fine upon religious worship. *Id.*

119. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988). In *Yonkers Racing*, a seminary petitioned the court to enjoin the city from condemning its property on the ground that their free exercise right would be violated. The court remanded the case on the first amendment issue, but said the court should accept as true the affidavit of the rector, who stated that the seminary could not carry out its mission if two acres of its property were condemned. The court determined that when a proposed government action would substantially affect religious practice, there exists at least a material issue of fact concerning whether the state has interfered with the right of free exercise. *Id.*

governmental entity be required to show a compelling interest. If the plaintiff cannot show this level of discrimination, "the state need only show a rational basis for the legislation. The [New York City landmark law] has such a rational basis."[120]

The establishment clause, which prohibits "an excessive entanglement between government and religion," was the basis for the Church's second claim under the first amendment.[121] The establishment clause was implicated because, in order to determine whether an applicant's hardship claim is valid, the landmark law authorizes the Commission to inquire into the applicant's financial status; an inquiry which the Church claimed was excessive and constitutionally impermissible. The court determined that the entanglement doctrine was not applicable, because the clause is violated only where a statute requires "extensive and continuous monitoring"[122] of religious institutions which are receiving some form of state aid.[123] The landmark law, by contrast, entails only a brief, single inquiry into the church's financial situation, and is thus constitutionally permissible.[124]

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120. *St. Bartholomew's Church*, 728 F. Supp. at 963, n.9. (S.D.N.Y. 1990), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). The court refers to the *Penn Central* case in which the Supreme Court upheld the constitutionality of the Landmarks Law. Penn Central Transp. Co, v. City of New York, 438 U.S. 104 (1978).

121. *Id.* at 963.

122. *Id.*

123. *Id.* To illustrate this principle, the court noted two cases: *Lemon v. Kurtzman*, 403 U.S. 602 (1976), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In *Lemon*, a state statute which provided state aid to religious schools was held unconstitutional because the purpose of the statute was to entangle the state in the administrative details of the school. While noting that the Constitution does not require complete separation between church and state, the Court stated, "a statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612.

NLRB involved teachers, represented by unions, against religious schools, who refused to bargain with the unions. The Court denied the request of the National Labor Relations Board to assume jurisdiction over the conflict, because of the danger of a government infringement upon religion. *NLRB*, 440 U.S. at 507.

124. *St. Bartholomew's Church*, 728 F. Supp. at 963.

b. *The Unconstitutional-as-Applied Claims*

The Church also claimed that even if the landmark law was not unconstitutional on its face, it was unconstitutional as applied to their church. The basis of the allegation was that the landmark designation and the subsequent denial of three applications for modifications prevented the Church from practicing its religious beliefs. Their argument was predicated on establishing that the existing community house was inadequate for their present and future needs, and the denial of the certificate would cause the Church to lose valuable revenue to fund charitable programs. Given the specific claims presented by the Church under the first and fifth amendments, the court recognized that "in this case, the first amendment inquiry is identical in scope to the fifth amendment inquiry, since to prevail on either claim the plaintiff must prove that it can no longer carry out its religious mission in its existing facilities."[125] The standard adopted by the district court was devel-

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125. *St. Bartholomew's Church*, 728 F. Supp. at 966. The fifth amendment states, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. As applied to St. Bartholomew's, the Church explained, the Landmark Law has severely curtailed its ability to use the property as it desires and that therefore a "taking" was effected in violation of the fifth amendment. The standard that the district court used to assess the fifth amendment claim was whether the landmark designation prevents or seriously interferes with the carrying out of the charitable or religious purpose of the institution. The district acknowledged that "the Supreme Court has never passed upon the constitutionality of regulations, such as landmark laws, as applied to the property of a charitable or religious institution." *Id.* Thus, the court borrowed an analogy from the only Supreme Court precedent on the Landmark Law: *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Yet, *Penn Central* was of limited utility to this court because it pertained to takings of commercial properties. The *St. Bartholomew's* court found that certain factors enumerated in the *Penn Central* case were still relevant to charitable properties. *St. Bartholomew's Church*, 728 F. Supp at 966. These included (1) "the economic impact of the government action (did the government action interfere with legitimate investment expectations?), and [(2)] the character of the government action, (is the action a physical taking or a land use regulation?)." *Penn Central*, 438 U.S. at 130-31. Thus, the concepts of the "owner's primary expectations" and "reasonable beneficial use" were to play a role in the fifth amendment analysis.

The district court in *St. Bartholomew's* used a second analogy from federal precedent. In *Lyng v. Northwest Indian Cemetery Protective Assn.*, the Court determined that government action violates the free exercise clause only if it prohibits a person from believing in his/her religion. *St. Bartholomew's*, 728 F. Supp. at 966

oped by the New York State courts in determining whether there had been a taking of charitable property in two cases: *Lutheran Church in Am. v. City of New York*[126] and *Society for Ethical Culture v. Spatt*.[127]

In *Ethical Culture*, the Society's meeting house was designated a landmark, and the Society alleged that the New York City landmark law resulted in a violation of the free exercise and takings clauses of the Constitution. The court dismissed the claims, stating that while the designation does impact the Society's use of the land, the test is "whether the impact on the Society and its charitable activities is so severe that the regulations become confiscatory."[128] In addition to meeting these standards, the church would have to show that it could not afford to make the existing facilities adequate for its needs. For example, in *Lutheran Church* the court held that the application of the landmark law was unconstitutional because the designation would result in a complete cessation of the church's charitable activities. Previously, the church attempted to modify the structure to suit its needs, to no avail.[129]

To apply the standards enunciated in *Lutheran Church* and *Ethical Culture* to the facts of *St. Bartholomew's Church*, the trial court conducted a *de novo* review of the factual findings resulting from the administrative hearings conducted by the Commission. The Church, among others had submitted reports addressing: (1) the adequacy of the community house for the Church's charitable programs, (2) the necessity and cost of structural and mechanical repairs for the Church building and community house, and (3) the Church's financial condition.[130]

To decide the first issue of the adequacy of the community house, the court carefully scrutinized the reports and determined that while the community house needed repair,

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(quoting *Lyng*, 485 U.S. 439 (1988)).

126. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

127. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

128. *Id.* at 454, 415 N.E. 2d at 925, 434 N.Y.S. 2d at 934.

129. *Lutheran Church*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

130. *See St. Bartholomew's Church*, 728 F. Supp. at 958.

demolition was too drastic a remedy.[131] Further, in examining the plans for the Church's community space in the proposed office tower, the court discovered that, for various reasons, the new space would be even more unsuitable than the existing community house. Due to this evidence, the court held that the "plaintiff has failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities . . . therefore, plaintiff's first and fifth amendment claims [as applied] must be rejected."[132]

An analysis of the second issue, concerning the necessity of repair to the community house, revealed that the true cost of repair was not fourteen million dollars as the Church's reports estimated, but was instead three million dollars.[133] This fact was considered for the analysis of the third issue, the Church's ability to pay the costs of repair.

In examining the evidence on the Church's financial condition, the court discovered that the Church's records showed a stock portfolio worth over twelve million dollars, and income generated by investments and contributions which totaled over fourteen million dollars.[134] Once these facts were revealed, the court held that the Church's hardship claim, under the landmark law was without merit, since they had ample assets.[135] The court concluded that "the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation."[136]

2. *The Second Circuit's Decision*

On appeal, the Church challenged only the dismissal of

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131. *Id.* at 968.

132. *Id.* at 974.

133. *Id.* at 972.

134. *Id.* at 973.

135. The Church also claimed that despite its assets, it could not run its charitable programs while expending three million for repairs, and that New York State law constrained its ability to spend its money for repairs. The court dispelled the validity of both claims. *Id.*

136. *Id.* at 974.

its first and fifth amendment claims.[137] Specifically, the Church disputed the district court's factual findings on whether the existing community house was adequate, whether the cost of repair was exaggerated, and whether the price of repair was affordable.[138]

The Second Circuit framed the issue before them as: "[W]hether a church may be prevented [by the landmark law] from replacing a church-owned building with an office tower?" and answered in the affirmative.[139] The court of appeals affirmed the holding of the district court, determining that the first and fifth amendment claims were correctly decided with the proper legal standard applied.[140] Under the applicable standard the Church must "prove that the landmark regulation prevented the Church from carrying out its religious and charitable mission in its current buildings."[141] Yet, unlike the district court, the court of appeals had the benefit of recent Supreme Court precedent to guide its determination of the applicable standard. During the period between the decision of the district court in January 1990 and the court of appeals in September 1990, the Supreme Court decided *Employment Div. Dept. of Human Resources v. Smith.*[142]

In *Smith*, the Court held that the free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of the drug peyote.[143] The Second Circuit summarized the import of this caselaw and stated that after *Smith*,

> the right of free exercise does not relieve an individual of

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137. *St. Bartholomew's Church v. City of New York*, 914 F. 2d 348, 350 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

138. *Id.* at 353. The court of appeals also affirmed the denial of intervention to a group opposed to the sale of St. Bartholomew's, and conferral of status as *amicus curiae*. *Id.* at 360.

139. *Id.* at 350.

140. *Id.* at 351.

141. *Id.* "A group's religious 'mission' is the central expression of its belief system, used to carry out the mandates of conscience." *Ministry and Mortar*, *supra* note 5, at 158.

142. 110 S. Ct. 1595 (1990).

143. *See id.*

> the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . . . The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented.[144]

Although the Church proffered statistics showing that, of the six hundred landmarked sites in the City, over fifteen percent were religious properties, the court of appeals concluded that the landmark law was a facially neutral regulation of general applicability. While the landmark law can affect activities associated with religious beliefs, the court stated, it does not regulate the beliefs themselves, and was therefore constitutionally permissible.[145]

The Church had argued that the landmark law was not a neutral regulation, like a zoning law, because the Commission exercises discretion that may be discriminatory. In the absence of evidence of intentional discrimination by the Commission in exercising its discretion, the court held the statistical allegations could not support a constitutional claim.[146] Additionally, the Church persisted, neutral regulations benefit everyone equally, and the landmark law does not benefit the owner at all, only those in the surrounding area. Finally, the Church compared the landmark law with discriminatory "reverse spot" zoning.[147] Rejecting these arguments, the court explained that zoning laws are not immune from biased or political interests. The owner of a property in an area where zoning laws apply does not always feel benefitted by the regulation. The zoning-landmark law analogy created by the Church ultimately was not apt, the court concluded, because,

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144. *St. Bartholomew's Church*, 914 F.2d at 354 (quoting *Smith*, 110 S. Ct. at 1600).

145. *St. Bartholomew's Church*, 914 F.2d at 354-55.

146. *Id.* at 355.

147. 'Reverse-spot zoning' is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *Id.*

> In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city . . . .[148]

The court analyzed the issue of whether the landmark law, by preventing the Church from constructing the office tower, and thus reducing the potential income the Church could earn on its property, contravenes the free exercise clause.[149] Reiterating the analysis enunciated in *Lyng*, the court stated that direct or indirect coercion of religious beliefs, or severe penalties prohibiting the practice of religion, were unconstitutional.[150] Under that standard, even techniques amounting to indirect coercion and penalties upon free exercise will rise to a level of constitutional significance.[151] However, the court stated, if a plaintiff cannot show a discriminatory motive, and the government action exerts merely incidental effects upon religion, the plaintiff will not prevail.[152] Unless a fundamental right, such as religion, is implicated, the strict scrutiny standard will not be applied. Such justification is necessary only when the government action imposes a substantial burden on the free exercise of religion.[153]

The court of appeals reviewed the fifth amendment claim and upheld the district court's dismissal. The commercial

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148. *Id.* (quoting *Penn Central*, 438 U.S. at 132.).

149. The court assessed two Supreme Court decisions which pertained to that issue: *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), and *Hernandez v. Commissioner of Internal Revenue*, 400 U.S. 680 (1989). In *Jimmy Swaggart*, the court held that a generally applicable sales and use state tax on plaintiff's property which diminished its income, did not impose a significant burden upon the free exercise of religion. The court in *Hernandez* paraphrased the *Lyng* test and phrased the issue as "whether government has placed a substantial burden upon the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden." The Court answered in the negative. *Hernandez*, 400 U.S. 682, 699 (1989).

150. *See supra* notes 117-19 and accompanying text.

151. *St. Bartholomew's Church*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

152. *Id.* at 355.

153. *Id.*

properties test in *Penn Central*[154] was controlling for charitable properties, the court stated, because the judicial determination presented the same constitutional question of "whether the land-use regulation impairs the continued operation of the property in its originally expected use."[155] The Second Circuit concluded that the landmark law does not effect a taking because the Church can continue its existing charitable and religious activities in its current facilities just as it had done prior to obtaining landmark status.

V. Analysis

> Judges must decide whether the government's purpose is legitimate and whether the means chosen to achieve it are reasonable. They must ascertain whether the asserted purpose is the real one or whether it is being used as a mask for illegitimate motivations.[156]

In *Society of Jesus*, *First Covenant*, and *St. Bartholomew's Church*, the state and federal judges differed in deciding whether the governments' purpose was legitimate and achieved in a reasonable way. These three cases are important to landmarks preservation because they illustrate the campaign currently being waged by religious property owners, challenging the landmark law on a first amendment basis.

According to the highest courts of Washington and Massachusetts, municipal landmark laws contravene the free exercise clause by the mere fact of designation of churches alone.[157] By contrast, the Second Circuit determined that neither the designation nor the subsequent regulation of churches as landmarks denies the religious their constitutional rights.[158] The Second Circuit determined that historic preser-

154. *Penn Central*, 438 U.S. 104 (1978).

155. *St. Bartholomew's Church*, 914 F.2d at 356.

156. LANDMARK JUSTICE, *supra* note 5, at 13.

157. *Society of Jesus*, 409 Mass. 38, 564 N.E.2d 571 (1990); *First Covenant*, 114 Wash. 2d 392, 787 P.2d 1352 (1990).

158. *St. Bartholomew's Church*, 914 F.2d 348, 353-54 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

vation was a legitimate purpose for New York City, and the law was a reasonable means of achieving that purpose. Additionally, the operation of the landmark law was not analogous to discriminatory practices such as spot-zoning.[159]

Both the trial and appellate courts in *St. Bartholomew's Church* carefully analyzed the facts and found that the church's free exercise claim was in fact "a mask for illegitimate motivations."[160] The deceptive aspect of the church's claim was twofold. First, the church's position that they could not afford the cost of repair or that they desperately needed funds from the tower proved fallacious because they possessed great wealth.[161] Second, the church's argument implicating the free exercise clause was specious since the community house activities, such as basketball, swimming, and dining, were not absolutely essential to their religious mission.[162] It seemed almost transparent that the Church was "putting greed ahead of religion and feigning hardship in an effort to win approval for a lucrative real estate deal."[163]

Yet *St. Bartholomew's Church* is not dispositive on the issue. Precisely because of case-specific factors, this case does not settle the issue for state or federal courts. For example, many religious property owners may not possess the wealth of St. Bartholomew's and may be able to prove that they cannot afford the cost of repair.[164] A religious property may also need to convert existing space into an income-producing asset in order to fund their religious programs.[165] *St. Bartholomew's Church* focused the controversy on the community house activities, many of which were distinct from the religious practices of the church, such as sports activities. Where the build-

159. *Id.* at 354-56.

160. LANDMARK JUSTICE, *supra* note 5, at 13.

161. *St. Bartholomew's Church*, 728 F. Supp. at 973.

162. National Trust for Historic Preservation, 8 Preservation L. Rep. 3,006 (1990).

163. Greenhouse, *Court Ends Tower Plan at St. Bart's*, N.Y. Times, Mar. 5, 1991, at B4, col. 1.

164. Nat'l Trust for Historic Preservation, 8 Preservation L. Rep. 3,001, 3,006 (1989).

165. *See Landmarking's Double-Edged Sword*, N.Y. Times, Jan. 13, 1991, § 10, at 1, col. 1.

ing is at issue, particularly the interior, the church may be able to create a stronger claim which "reaches directly into the church's worship space."[166]

Boston's landmark law is unique in that it regulates only the exterior features of churches. In New York City, for example, the landmark law specifically exempts the interiors from regulation.[167] Yet, regulation of the interior of a landmark can often be as essential as the regulation of the exterior. In *Sameric v. City of Philadelphia*,[168] the court upheld the constitutional validity of the designation of interior of commercial space, an Art Deco movie palace. Acknowledging that the Philadelphia landmark ordinance did not expressly authorize the designation of interiors, but only "buildings," the court stated that its construction rested on the fact that interiors are an essential component of buildings, "particularly where the interior design reflects the same architectural elements."[169]

Since the Supreme Court denied certiorari in *St. Bartholomew's Church*, the test adopted by the Second Circuit for analyzing the church's claims under the first amendment did not create binding precedent for any other courts.[170] Thus state courts, like those in *Society of Jesus* and *First Covenant*, can adopt subjective determinations of whether the right of free exercise has been infringed. Both *Society of Jesus* and *First Covenant* employed a strict scrutiny test in their analyses, but the subjective element in their determinations was deciding that landmark preservation was not a "compelling" interest.[171] Both of these courts accepted the churches' challenges at face value, and did not pierce the facts as did the *St. Bartholomew's Church* court. For example, the *Society of Jesus* court stated that "the mere fact that the

166. *Society of Jesus*, 409 Mass. at 42, 564 N.E.2d 571, 573.

167. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-303(a)(2) (1986).

168. National Trust for Historic Preservation, 8 Preservation L. Rep. 3,068-3,071 (1989).

169. *Id.* at 3,069.

170. This test was itself an adaption of the test devised by New York State. See *supra* notes 125-28 and accompanying text.

171. *See supra* notes 62-63 and accompanying text.

Jesuits honestly perceived a restriction . . . tends to show the impact of the Landmark Statute on their religious practices,"[172] rather than insisting on empirical proof.

Religious property owners wage these legal battles because they are the first steps in an attempt to become completely exempt from the landmark laws. Thus, another issue which emerges from these three cases is whether landmark laws should be held invalid when applied to religious properties. Such a provision, which has already been enacted in section 21-69 of the Chicago landmark law, "gives a special status to religious buildings under Chicago's landmark ordinance."[173] Whenever a church is nominated for landmark status, the archbishop is vested with a veto power by section 21-69.1 of the landmark law to reject the designation.[174] Unlike most landowners, whose consent is not a prerequisite to landmark designation, religious property in Chicago "cannot be designated a landmark without the owner's express consent."[175]

The constitutional validity of section 21-69 was recently questioned in *Alger v. City of Chicago*.[176] In November, 1989, the Roman Catholic Archbishop of Chicago declined to give his consent to the designation of St. Mary's Church as a landmark.[177] Subsequently, the Landmark Preservation Council of Illinois and the National Trust for Historic Preservation[178] brought suit against the City of Chicago and its agent,

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172. Nat'l Trust for Historic Preservation, 8 Preservation L. Rep. 3007, 3008 (1989).

173. Alger v. City of Chicago, 748 F. Supp. 617, *motion denied*, 753 F. Supp. 228, 229 (N.D. Ill. 1990).

174. *Alger*, 748 F. Supp. 617.

175. *Alger*, 753 F. Supp. at 229.

176. Alger v. City of Chicago, 748 F. Supp. 617, *motion denied*, 753 F. Supp. 228 (N.D. Ill. 1990). In September 1990, the plaintiffs' complaint was dismissed for lack of standing. *Alger*, 748 F. Supp. at 617. Three months later, the plaintiffs petitioned the court leave to file an amended complaint. *Alger*, 753 F. Supp. at 228.

177. *Id.* at 229.

178. The National Trust for Historic Preservation was created by Congress in 1949. Congress vested the National Trust with the power to own and preserve sites, buildings and objects significant in American history and culture, and the mission to "facilitate public participation in that activity." THE NAT'L TRUST FOR HISTORIC PRESERVATION, 1989 ANNUAL REPORT at 3. The National Trust is America's largest historic preservation organization, and serves as an umbrella and support system for

the Commission of Chicago Landmarks, seeking a declaration that section 21-69 contravenes the establishment and equal protection clauses of the federal Constitution.[179] Standing in the case was based on the claim that their " 'use, enjoyment and aesthetic appreciation' of St. Mary's was threatened by the operation of section 21-69.1, due to the consequent possibility that St. Mary's could be altered or demolished."[180] The court dismissed the plaintiffs' case for lack of standing, because the issue was not ripe since administrative remedies had not been exhausted.[181]

New York State debated the merits of similar legislation in the early 1980's. The Walsh-Flynn Bill of 1982 proposed that religious institutions should be able to "opt-out" of landmark status at any time.[182] Ultimately, the bill was defeated.[183] Yet, the problems inherent in a landmark law which allows religious institutions to "opt-out" are legion. If religious institutions were accorded this privilege, it would be tragic since, "churches and synagogues are some of the most significant buildings in any community,"[184] and many religious institutions have already expressed the desire to "opt out" of their landmark designation.[185] In addition, there is also the danger that the privilege would be extended to all non-profit institutions in the same way the tax-exempt status of religious organizations was extended to all non-profit institutions.[186] Thus, elective "opt-out" legislation creates the potential for a staggering depletion of landmarks:

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millions of community activists in thousands of local and statewide groups. *Id.* at 4. For example, the National Trust also participated in the *St. Bartholomew's* litigation. See *infra* notes 87-154 and accompanying text.

179. *Alger*, 753 F. Supp. at 229-30.

180. *Id.* at 229.

181. *Alger*, 748 F. Supp. 617.

182. The New York Chapter of the American Institute of Architects, *Should Religious Properties Be Exempt from Landmark Laws*, *Occulus*, *supra* note 12, at 3.

183. *Id.*

184. *Id.*

185. *See* Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986).

186. Occulus, supra note 12, at 3.

> For a whole category of buildings to be allowed to be exempt would create a serious precedent . . . [I]t has to be recognized that if one category of tax-exempt owners becomes exempt from the landmark laws, then universities, schools and other not-for-profit owners who also believe that they have problems and would like to capitalize on the value of their real estate, may seek to follow. If there is an exemption built into this law whereby tax-exempt owners must consent to designation, commercial interests will also seek such an exemption . . . . An owner-consent provision is tantamount to no regulation whatsoever.[187]

St. Bartholomew's Church, *Society of Jesus*, and *First Covenant*, are important, not only for the courts' dispositions of the specific facts at issue, but also for their analyses of the notable aspects of the function and structure of municipal landmark laws. For example, the landmark laws of New York, Boston, and Seattle, provide extensive due process, giving notice and opportunity to be heard through administrative hearings, which are available to property owners prior to recourse to judicial actions. The landmark laws also make explicit provisions for future structural changes by providing the certificate procedure, whereby landmark owners can make reasonable alterations.[188]

Further, legislatures have made special efforts to accom-

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187. *Id.* at 3, 5.

188. For example, the New York City Commission's Designation Report for St. Bartholomew's explicitly provides for the possibility of change in the life of the landmarked building and wants to accommodate it, where possible:

> The Landmarks Preservation Commission recognizes that the Landmark and the Landmark Site are used by St. Bartholomew's Church for religious and charitable purposes and that, in the future, the Church may consider it necessary to alter or expand the existing structures or erect additional structures on the Landmark Site. By this designation . . . it is not intended to freeze the structures in their present state or to prevent the alteration or expansion of existing structures or the erection of other structures needed to meet the Church's requirements in the future. The Commission believes it has the obligation and it has the desire to cooperate with owners of Landmarks in such situations and looks forward to working with representatives of St. Bartholomew's Church should such contingencies occur.

St. Bartholomew's Church and Community House, LP-0275 (New York City Landmarks Preservation Commission 1967) (Designation).

modate the needs of non-profit institutions, like churches, in the landmark laws. Although the structural changes and proposals may not be granted in all situations, the procedures allow for appropriate modifications. If the non-profit applicant cannot afford to make repairs, and can prove that inability, the laws provide "hardship relief."[189] Another innovative accomodation of non-profit institutions in landmark laws, was exemplified by a recent amendment to the New York City landmark law. Recently, the legislature created a second administrative review panel for non-profit organizations applying for a certificate of appropriateness, to insure that their special needs are adequately considered.[190]

Landmark commissions have also made special efforts to accommodate the needs of landmarked urban churches. The commissions have recommended special property laws which enable religious and non-profit institutions to obtain a higher return on their property, and obtain rental income for religious activities. In New York City, for example, the Transfer of Development Rights (TDR)[191] zoning ordinance authorizes the transfer of development rights "to adjacent lots from lots occupied by landmark buildings."[192] Through the TDR zoning ordinance, a church like St. Bartholomew's could be given property rights to the airspace in a building across the street, and build a homeless shelter or rent office space to private developers, without destroying the integrity of their historically and culturally valuable edifice.

Another observation about landmark laws was raised in oral arguments for *St. Bartholomew's Church*. Despite the availability of judicial review, the church argued, landmark laws exert a "chilling effect" upon the free exercise of reli-

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189. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-309 (Under the "hardship exemption," the commission affords a special exemption from the landmark law to those non-profit institutions whose financial status conforms to statutory criteria showing an inability to afford costs of landmark maintenance or repair).

190. NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-308 (1986); SEATTLE, WASH., MUN. CODE, ch. 25.12, § 25.12.670-.830 (1977); 1975 Mass. Acts 772.

191. NEW YORK, N.Y., ADMIN. CODE, § 74-79 *Transfer of Development Rights from Landmark Sites*, Zoning Resolution (1988).

192. *Id.*

gion.[193] The substance of this argument was that the landmark law makes religious people hesitant to express their faith "for fear that if circumstances and conditions change . . . they may be frozen in those structures."[194] Further, the landmark law limits the utility of a landmark to the purposes for which it was being used at the time of its designation, and "freezes" that purpose in time, despite the changing needs of the owner. If a church wants to expand its physical plant to suit its mission, the law may not allow the church to alter the building. Church owners urged, "[t]here has to be some balance here, where people don't always make the worship of the building the whole thing and forget why the building was built . . . ."[195]

Undeniably, the landmark laws do limit or "chill" an owner's ability to alter the property, however, the laws also provide escape valves for an owner, provided by the certificate procedure and hardship claim.[196] Finally, the benefits reaped by the general public from historic preservation aesthetically, historically and culturally, outweigh the limitations on a few individual property owners.

VI. Conclusion

> The interests of the City and the Church are substantial and a determination by this court as to the constitutionality of the landmarks ordinance will clarify valuable property rights of churches and their freedom to practice religion. A decision here will be welcomed throughout the United States.[197]

Given the growing urgency of this problem, both the preservation and religious communities believed that the decisions in *Society of Jesus*, *First Covenant*, and *St. Bartholomew's*

193. Record of Oral Arguments before the Court of Appeals at 5. *Bartholomew's Church*, 914 F.2d 348 (2d Cir. 1990).

194. *Id.* at 4.

195. *Battle Rejoined*, *supra* note 5, at col. 4.

196. *See supra* notes 9-18 and accompanying text.

197. *First Covenant*, 114 Wash. 2d at 399, 787 P.2d at 1355-56.

Church would resolve the issue of whether landmark laws as applied to churches violate the right of free exercise. Yet, that belief has not come to fruition. Since the Supreme Court denied certiorari in both *First Covenant* and *St. Bartholomew's Church*, the Court did not create binding constitutional precedent which federal and state courts would be required to follow. Similarly, the Boston Landmark Commission decided not to appeal the holding in *Society of Jesus*, thus none of the cases are dispositive on the issue.

Examining the Court's treatment of *First Covenant* and *St. Bartholomew's Church* cumulatively, however, offers some guidance as to the future direction of this legal issue. By the denial of certiorari in *St. Bartholomew's*, the Court "let stand a ruling that the landmark status of St. Bartholomew's Church does not violate religious freedom."[198] In *First Covenant*,[199] the Court granted certiorari, but did not write an opinion. Instead, the Court vacated the holding of the Washington state court, which had held that Seattle's landmark law was unconstitutional as applied to religious buildings. The Justices then instructed the Washington court to reconsider its ruling in light of the *Smith*[200] decision, which was the standard against which the New York City landmark law was measured in *St. Bartholomew's Church*. Consequently, the Court's disposition of the factually-similar *First Covenant*, was interpreted as a "strong clue that, at least for a majority of the Justices, the outcome of the *St. Bartholomew's Church* case was correct."[201]

Due to the threats of the "opt-out" legislation, as well as the ever-increasing urban pressures, a definitive Supreme Court ruling on the issue is necessary to ensure the strength of the historic preservation movement in light of this new constitutional challenge. Landmark laws have shown an amazing flexibility in accommodating the needs of religious property

198. Greenhouse, *Court Ends Tower Plan At St. Bart's*, N.Y. Times, Mar. 5, 1991, at 1, col. 3.

199. 114 Wash. 2d 392, 787 P.2d (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

200. *See supra* notes 143-45 and accompanying text.

201. *Id.* at 4, col. 1.

owners, through the availability of the hardship claims, zoning resolutions, and extra appeals panels. These laws have shown that it is possible to strike a balance between the competing interests of the religious property owners and municipal governments, rather than negating one interest at the expense of the other.

Landmarks must be valued by society before they are destroyed, because once destroyed, landmarks are irretrievably ruined. Legislation designed for the protection of landmarks must be strengthened, not eroded by specious constitutional claims, such as those levied in *St. Bartholomew's Church*, *First Covenant*, and *Society of Jesus*. After all, as a society, "we will probably be judged not by the monuments we build, but by those we have destroyed . . . ."[202]

202. N. SILVER, LOST NEW YORK 38 (1967).